IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2014-CA-1488

BOBBY LEON GIBSON **APPELLANT**

V.

WILLIAMS, WILLIAMS & MONTGOMERY, P.A., ET AL. **APPELLEE**

APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI CIVIL ACTION NO. 2009-0041-PR-G

BRIEF OF APPELLEES WILLIAMS, WILLIAMS & MONTGOMERY, P.A. AND JOE H. MONTGOMERY

ORAL ARGUMENT REQUESTED PURSUANT TO MISSISSIPPI RULE OF APPELLATE PROCEDURE 34(B)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Bobby Leon Gibson, plaintiff;

Williams, Williams & Montgomery, P.A., defendant;

Joe H. Montgomery, defendant;

Chuck McRae, Esq., and Seth C. Little, Esq., counsel for appellant;

Thear Lemoine, Esq., James G. Wyly, III, Esq., and Christine Whitman, Esq., counsel for defendants;

Christopher M. Howdeshell;

Michael Leroy Miles;

J. Wyatt Hazard, Esq., and M. Davidson Forester, III, counsel;

Hon. Hollis McGehee, Chancellor; and

Hon. Deborah J. Gambrell, Chancellor.

SO CERTIFIED, this the 15th day of July, 2015.

/s/ James G. Wyly, III
James G. Wyly III

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STATEMENT OF THE ISSUES

WWM submits the following statement of the issues:

1) The trial court correctly granted summary judgment in favor of WWM on grounds that Plaintiff Bobby Leon Gibson is estopped from collaterally attacking the Judgment in the underlying conservatorship and estate proceedings, *In the Matter of the Estate of Deborah Miles Gibson*.

2) The trial court correctly held that Plaintiff failed to prove, by competent evidence, the existence of an attorney-client relationship between himself and WWM, such that no duty existed which might support a legal malpractice action.

3) The trial court correctly granted summary judgment in favor of WWM because Plaintiff failed to establish causation of his alleged damages through any action of WWM, where Plaintiff caused his own damages on his own volition by failing to seek reconsideration or appeal and, instead, filing a legal malpractice action.

STATEMENT OF THE CASE

This lawsuit and appeal are nothing more than an attempt by Plaintiff Bobby Leon Gibson to forum shop and make an "end-run" around the Judgment of the Forrest County Chancery Court in underlying conservatorship and estate proceedings, In the Matter of the Estate of Deborah Miles Gibson. Instead of seeking relief in those proceedings, Plaintiff now, in this separate proceeding, collaterally attacks the underlying Chancery Court Judgment and seeks inconsistent findings that would undermine both the letter and spirit of that Judgment. Mississippi Court Rules prescribe a specific procedure for reconsideration and appeal of a Judgment when a party is aggrieved by it. If Plaintiff believed he had viable grounds to have the Judgment set aside, then he should have sought that ruling in the underlying conservatorship and estate proceedings, either in Chancery Court or on review by this Honorable Court.

Plaintiff, and his present attorneys, who were retained well before deadlines expired for challenging the underlying Judgment, opted not to appeal the underlying Chancery Court Judgment. Plaintiff filed a motion to re-open, but did not set it for hearing. Instead, Plaintiff chose to collaterally attack the underlying Judgment in this proceeding. Allowing Plaintiff to proceed in this fashion would undermine the validity of any judgment, and would provide a sanctioned means for an endless stream of dissatisfied litigants to collaterally attack issues that have been settled in final judgments. Respectfully, Defendants Joseph H. Montgomery and Williams, Williams & Montgomery, P.A. (collectively, "WWM") submit that the Court should affirm the lower court's refusal to allow Plaintiff to proceed with this action. Plaintiff additionally proffers no competent evidence substantiating the existence of an attorney-client or fiduciary relationship, or any causal link between the alleged actions of WWM and Plaintiff's claimed harm.

The lower court's Judgment, granting WWM's Motion to Dismiss, or Alternatively, for Summary Judgment, should be affirmed in all respects.

STATEMENT OF THE FACTS

The operative facts are not subject to reasonable dispute:

In April of 2009, the Forrest County Chancery Court established a Conservatorship over the person and estate of Deborah Miles Gibson. (R. p. 28). Michael Miles was appointed Conservator and the Conservatorship was represented by Christopher Howdeshell of Pittman, Howdeshell, Hinton & Hightower. (R. p. 28-34).

In October of 2010, Deborah Miles Gibson passed away. (R. p. 36). A Petition to Convert was filed on October 12, 2010, with Plaintiff's assent, requesting that the Court convert the Conservatorship into an Estate proceeding. (R. p. 35-46). The Chancery Court granted the

Petition on October 14, 2010. (R. p. 47-52). David Miles was named Executor and WWM represented him in that capacity. (R. p. 53, 54-55, 56-58).

In November 2010, it was established that several guns, which were supposed to be part of the Estate, were in the possession of a third party. The Executor petitioned the Chancery Court for authority to recover the property. (R. p. 65-78).

Seven months later, on May 11, 2011, the Estate filed an Inventory, First and Final Accounting, a Petition to Pay Attorney's Fees and Costs, and a Petition for Distribution to Close Estate and Vest Title ("Petition for Distribution"). (R. p. 126-145). The Petition for Distribution specified the requested distribution of Estate assets, and clearly indicated WWM's role was as attorney solely for the Estate. (R. p. 138). Plaintiff agreed to the distribution and signed the Petition. (R. p. 141).

On May 18, 2011, the Chancellor entered a Judgment Ratifying Inventory and First and Final Account; and Authorizing Payment of Attorney's Fees and Costs and Distribution. (R. p. 146-162).

On July 12, 2011, a Petition to Appoint Co-Trustee of Testamentary Trust was filed, requesting that Plaintiff be appointed as one of the trustees over his grandson's educational trust. (R. p. 172-175). Plaintiff agreed to and signed the Petition. (R. p. 174-175). An Order was then granted, on July 7, 2011, approving the appointment of Plaintiff as a trustee. (R. p. 176-179).

Almost one year later, on May 10, 2012, Plaintiff, through his current attorneys, filed a Petition to Re-open Estate of Deborah Miles Gibson and Request Other Relief, with the Chancery Court of Forrest County in the matter of the Estate of Deborah Miles Gibson. (R. p. 220-280). The Petition raises nearly identical allegations as those asserted in the Complaint in the instant action. (R. p. 445-489). Importantly, Plaintiff wholly failed to take any action on his Petition to set it for hearing or even to serve it on the parties. (R. p. 2-12).

On May 2 and 14, 2012, Chancellor Deborah Gambrell signed and entered, respectively, her Judgment Vesting Title, Closing Estate and Authorizing Executor to Retain Funds Remaining in Estate Account Until Guardian Ad Litem is Discharged and Authorizing Him to Deliver Refund Check to Miles Smith (who is the decedent's son). (R. p. 281-285). This Judgment resolved and ratified the entirety of the actions which formed the basis of Plaintiff's Petition to Re-open and which now forms the basis of this action and appeal:

a. retrieval by the Estate of guns that were improperly held by a third party;

b. signature by Plaintiff of the Petition to Convert the Conservatorship to the Estate of Deborah Miles Gibson;

c. actions taken pursuant to the Inventory, First and Final Account by David Earl Miles, Petition to Pay Attorney's Fees and Costs, and Petition for Distribution, to Close Estate and Vest Title filed on May 11, 2011;

d. the setting aside of $50,000 from insurance proceeds to satisfy a bequest to Plaintiff's natural grandson's educational trust;

e. the delivery of the gun collection to Plaintiff; and

f. transfer and delivery of all corporate stock and interest in Joe N. Miles & Sons, Inc. to Miles Smith.

On May 15, 2012, just 24 hours after Chancellor Gambrell entered her Judgment, Plaintiff filed this separate action in Forrest County Circuit Court, rather than urging his Petition to Re-open in the underlying proceeding and seeking to rectify any deficiencies he found with the Judgment. (R. p. 445).

On July 24, 2012, Defendants Pittman, Howdeshell, Hinton & Hightower, PLLC and Christopher M. Howdeshell (collectively, "Howdeshell") filed a Motion to Transfer and/or Motion to Dismiss. (R. p. 398-428). WWM filed a Motion to Transfer and/or Motion to

Dismiss on August 8, 2012. (R. p. 381-382). Conservator Michael Miles moved for summary judgment and, alternatively, for transfer on August 24, 2012. (R. p. 331-339).

The Circuit Court granted the motions to transfer on January 22, 2013. (R. p. 293-296). The Order transferred Plaintiff's Circuit Court action to the Chancery Court. The transferred Circuit Court file was received by the chancery court on June 27, 2013. (R. p. 292). Upon transfer, the Chancellors of Forrest county recused themselves (R. p. 497), and Special Chancellor Hollis McGehee was appointed by this Court. (R. p. 492-493).

Plaintiff did not refile his Complaint in the Chancery Court after the transfer. (R. p. 2-12). Instead, Howdeshell filed a Motion to Dismiss and/or Motion for Summary Judgment, with Memorandum in Support, on November 20, 2013; Michael L. Miles filed for summary judgment on January 15, 2014 (R. p. 519-579); and WWM filed a Motion to Dismiss, or, Alternatively, Motion for Summary Judgment, with Memorandum in Support, on January 31, 2014. (R. p. 633-827). A hearing was held on May 22, 2014, before Chancellor McGehee. At the hearing, Plaintiff, through counsel, agreed to the dismissal of Howdeshell and Michael Miles. (Trans. p.3, lines 8-16). Judge McGehee took the matter under advisement, and directed the parties to draft proposed findings of fact and conclusions of law. (R. p. 828).

On June 3, 2014, Judge McGehee entered a Final Judgment, dismissing the Conservator, Michael Miles, with prejudice, and finding that "the attorney for plaintiff announced to the Court that plaintiff does not oppose the [summary judgment] motion." (R. p. 979). On June 16, 2014, Judge McGehee entered a Final Judgment, dismissing Howdeshell with prejudice, because "plaintiff does not oppose the motion." (R. p. 992).

Chancellor McGehee entered his Order and Reasons Granting WWM's Motion for Summary Judgment on September 16, 2014. (R. p. 1003-1006). The Order and Judgment

dismissed WWM, who by that time were the only remaining defendants, and Plaintiff's claims, with prejudice. (R. p. 1005). Plaintiff appealed. (R. p. 1007-1008).

SUMMARY OF THE ARGUMENT

The Judgment of the trial court is proper and should be upheld for the following reasons:

Plaintiff's claims are procedurally barred by the equitable doctrines of judicial estoppel, and issue and claim preclusion. Plaintiff is estopped from bringing claims which were addressed by the chancery court in the underlying Estate proceeding. He abandoned his proper remedies of moving for reconsideration or appeal in the Estate proceeding to pursue a legal malpractice claim, choosing to create the damages for which he now seeks recovery. Plaintiff does not dispute the course of conduct that estops his legal malpractice action but instead points to *his own* failure to pursue remedies available in the Estate proceeding as bases for precluding estoppel. The Mississippi Supreme Court has adopted the principle of judicial estoppel to protect the integrity of the courts and to preclude self-serving paradoxes by parties. Judicial estoppel is enforced to prevent parties from playing "fast and loose" with the courts to suit the exigencies of self-interest.

Plaintiff is further precluded from maintaining this action because his cause of action constitutes a collateral attack on the findings of Chancellor Gambrell in the Estate Proceeding. Reconsideration or appeal were available means to seek the redress of alleged errors in Chancellor Gambrell's judgment – neither of which Plaintiff ever executed. Plaintiff's claims were properly adjudicated before Chancellor Gambrell and are precluded by her now-final Judgment.

Plaintiff argues that Chancellor Gambrell failed to protect his rights by holding a hearing on the Motion to Re-Open. But a motion not set for hearing is effectively abandoned. Moreover, without citing authority requiring such action by the Chancellor, Plaintiff has attacked

Chancellor Gambrell's conduct under the Estate Proceeding. Again, the remedy for his grievances would have been to move for reconsideration or to appeal. Plaintiff clearly had knowledge of the issues for which he now seeks adjudication at the time the Chancellor entered her Judgment. The operative facts set forth in the Motion to Re-Open are identical to those included in his present Complaint. Instead of using proper methods for resolution of the alleged misconduct by Defendants and error by the Chancellor, Plaintiff sought a new forum in the Circuit Court, undermining the authority of the Chancery Court. The procedural bars of estoppel and preclusion of collateral attack require dismissal of Plaintiff's claims.

Plaintiff's claims are further subject to summary judgment because he has not and cannot offer evidence of an attorney-client or fiduciary relationship between himself and WWM. Plaintiff offered no competent evidence to support a reasonable belief that WWM were acting as his attorneys or owed him a duty during the Estate proceedings. He also failed to offer any substantiation of the claimed "overmastering influence" allegedly giving rise to a fiduciary relationship between himself and WWM. No evidence of influence or of susceptibility to influence (age, frailty, lack of education) was submitted.

Plaintiff also failed to offer any competent summary judgment evidence raising a genuine issue of material fact in support of causation or damages, necessary elements of his legal malpractice and breach of fiduciary duty claims. Plaintiff cannot establish a causal link between his alleged damages and the actions of WWM, where he chose not to pursue proper remedies after the chancery court entered Judgment supposedly contrary to his claims therein and, having allowed the Judgment to become final through his actions and inaction, pursued a legal malpractice action based on the same allegations.

Finally, other procedural deficiencies support dismissal and/or summary judgment. Specifically, Plaintiff failed to comply with a requirement of Mississippi Code section 11-1-39

that the Complaint be re-filed before a transferee court, after effect of a transfer. This is to ensure proper notice to parties involved in the litigation of the claims post-transfer, and it must take place within 30 days of transfer. It is also a procedural mechanism meant to prevent stagnation of claims and failure to prosecute by a plaintiff. Plaintiff does not deny failure to re-file his Complaint within the 30-day period. As he failed to comply with the statute, his action is procedurally improper and should be dismissed.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL.

A. Res Judicata and Collateral Estoppel

In the interest of finality, litigation must come to an end at some point. "[T]he rights of the parties *inter se* must become fixed."[1] "[S]uccessful defendants are at some point entitled to repose" – "[r]elitigation of matters already decided between the parties serves no useful purpose, in part because it cannot be assumed that subsequent litigation is any more reliable than the original litigation."[2] If the Estate is closed, as reflected in Chancellor Gambrell's Judgment, then Plaintiff's action is an improper attempt to collaterally attack the Chancery Court ruling. Based on the record, it appears Plaintiff forum-shopped. Plaintiff did not like the Chancery Court Judgment, so he filed suit in Circuit Court the day after it was entered, rather than seeking reconsideration in Chancery, or review on appeal.[3] The Chancery Court Complaint (later transferred to Chancery Court) encompasses precisely the same allegations raised before the Chancery Court and seeks, implicitly if not explicitly, to discredit the legitimacy of Chancellor Gambrell's Judgment.

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[1] JEFFREY JACKSON AND MARY MILLER, COLLATERAL ESTOPPEL AND RES JUDICATA, MISS. ENC. PRAC. §14:1.
[2] *Id.*
[3] Indeed, despite the issuance of process in the underlying Estate Matter of Gibson's Petition to Re-Open, Gibson never effected service.

The application of *res judicata* looks to four identities between the action in which it is being applied and an earlier action: (1) subject matter; (2) cause of action; (3) parties; and (4) the quality or character of the person against whom the claim is made.[4] If these are present, the parties are prevented from re-litigating the issues tried in the prior lawsuit, as well as all matters which should have been litigated but were not.[5]

Collateral estoppel precludes the re-litigation of specific issues: "(1) actually litigated, (2) determined by, and (3) essential to the judgment in a former action though a different cause of action is the subject of the subsequent action."[6] Collateral estoppel requires only that an issue was decided, not that there was a specific finding on the issue.[7] "If a decision on the issue was 'necessary' or 'essential' to the judgment, the decision on the issue will be given preclusive effect."[8] "An issue is essential to the judgment if the verdict could not have been rendered without a decision on the issue."[9]

It is undisputed that Plaintiff filed a Petition to Re-Open the Estate in the underlying proceedings, with identical allegations to those now before the Court.[10] Plaintiff's Petition to Re-Open in the underlying proceeding and the Complaint in the present matter meet the criteria for the application of *res judicata* as follows: (1) the subject matter is identical, which is evident upon a side-by-side reading of the Petition to Re-open and the Complaint; (2) the Petition to Re-open alleges the same facts and includes similar fiduciary duty breach and legal negligence allegations to those in this action; (3) the parties here were parties (or in privity with parties) in

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[4] *See Dunaway v. W.H. Hopper & Assocs., Inc*., 422 So. 2d 749, 751 (Miss. 1982).
[5] *Pray v. Hewitt*, 179 So. 2d 842 (Miss. 1965); *and Golden v. Golden*, 151 So. 2d 598 (Miss. 1963).
[6] *Hollis v. Hollis*, 650 So. 2d 1371 (Miss. 1995); *Lee v. Wiley Buntin Adjuster, Inc*., 204 So. 2d 479 (Miss. 1967); *Lyle Cashion Co. v. McKendrick*, 227 Miss. 894, 87 So.2d 289 (1956).
[7] *See, e.g., Hollis*, 650 So. 2d 1371.
[8] *Richardson v. Audubon Ins. Co*., 948 So. 2d 445 (Miss. Ct. App. 2006) (noting that collateral estoppel bars relitigation of issue even though the second action involved a different cause of action).
[9] *Mississippi Employment Sec. Com'n v. Philadelphia Mun. Separate School Dist. of Neshoba County*, 437 So. 2d 388, 13 Ed. Law Rep. 896 (Miss. 1983).
[10] (R. p. 220-280).

the underlying proceeding; and (4) the quality and character of the defendants is identical in both actions.

"Although identity of the parties is a necessary element of *res judicata*, this Court repeatedly has held that 'strict identity of the parties is not necessary for either *res judicata* or collateral estoppel to apply, if it can be shown that a nonparty stands in privity with the party in the prior action.'"[11] "A non-party defendant can assert *res judicata* so long as it is in 'privity' with a named defendant."[12] Mississippi courts have defined "privity" as follows:

> The identities of the parties must be at least in privity with one another. It is not necessary to use strict identity. "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." "Privity" is a broad concept that requires us to look at the surrounding circumstances in order to determine whether a claim preclusion is justified.[13]

WWM served as the attorney for David Miles, Executor of the Estate. Under the above authority, WWM would be considered to be in privity with David Miles for *res judicata* purposes.[14] David Miles was a party to the Estate action as the Executor of the Estate. Additionally, the Estate, David Miles and WWM were named in the allegations of the Petition to Re-Open.[15] Plaintiff had process issued (but never served) on Joseph Montgomery in connection with the Petition to Re-open. Identity of parties, either directly or through privity, is clearly established.

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[11] *EMC Mortg. Corp. v. Carmichael*, 17 So. 2d 187, 1090-91 (Miss. 2009) (citing *Hogan v. Buckingham*, 730 So.2d 15, 18 (Miss.1998)); *Johnson v. Howell*, 592 So.2d 998, 1002 (Miss.1991); and *Walton v. Bourgeois*, 512 So.2d 698, 701 (Miss.1987)).
[12] *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 236-37 (Miss. 2005).
[13] *In re Estate of Bell*, 976 So. 2d 965, 968 (Miss. Ct. App. 2008) (internal citations omitted).
[14] *See Jones v. McCullum*, 2013 WL 5563787, *5-6 (S.D. Miss. Oct. 7, 2013) and *Harrison*, 891 So. 2d at 236 (an attorney who represents named defendants in prior action is in "privity" with them for purposes of *res judicata* analysis).
[15] (R. p. 220-280).

Chancellor Gambrell signed her Judgment on May 2, 2012, and entered it on May 14, after Plaintiff filed his Petition to Re-Open the Estate on May 10.[16] The Judgment adjudicated, fully and finally, the issues raised in Plaintiff's Petition to Re-Open, then pending before her Court. Indeed, Plaintiff admitted the that the Judgment was an approval of the actions taken within the Estate proceeding, *including* those raised in his Petition to Re-Open.[17] *Res judicata* and collateral estoppel dictate that those issues, and any other issues that were or could have been raised in the Estate proceeding, are now barred.

Further, a chancery court has full power to hear "matters testamentary and of administration."[18] Under Mississippi Code section 9-5-83, a chancellor has authority to commence inquiry into allegations of improper action by a guardian, conservator or the estate, by its executor or attorney.[19] Chancellor Gambrell, in the face of Plaintiff's Petition to Re-Open, entered the Judgment, ratifying the distribution of assets Plaintiff now challenges. In essence, Plaintiff seeks to maintain a professional negligence cause of action, the core allegations of which are contrary to Chancellor Gambrell's Judgment.

Plaintiff argues that his legal malpractice cause of action is different in nature from the underlying Estate action, so that estoppel is inapplicable. This position ignores clear Mississippi law. Collateral estoppel "precludes parties from relitigating the exact issue in a different and subsequent cause of action."[20] Plaintiff did not contest the application of collateral estoppel in

[16] (R. p. 281-285, and 220).
[17] (R. p. 833).
[18] Miss. Const. art. 6, § 159.
[19] Miss. Code Ann.§ 9-5-83.
[20] *City of Jackson v. Lakeland Lounge of Jackson, Inc*., 688 So. 2d 742, 748 n.1 (Miss. 1996); *Hollis*, 650 So. 2d at 1377 ("the parties will be precluded from relitigating a specific issue [1] actually litigated, [2] determined by, and [3] essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action.").

his briefing before the trial court.[21] Issues not brought to trial court's attention by the appellant cannot be raised for the first time and considered on appeal.[22]

Plaintiff's claim that Chancellor Gambrell's May 14, 2012 Judgment does not expressly reference his Petition to Re-Open ignores the undisputed procedural history of the Estate proceeding. The factual issues raised by the Petition to Re-Open were actually litigated in the underlying Estate proceeding and facts directly contrary to the allegations within the Petition to Re-Open are essential to the May 14, 2012 Judgment. Again, Plaintiff admitted in his trial court briefing that the that the Judgment was an approval of the actions taken within the Estate proceeding, *including* those raised in his Petition to Re-Open.[23] His current contention otherwise is self-serving and contradictory.

The Judgment Vesting Title, Closing Estate and Authorizing Executor to Retain Funds Remaining in Estate Account Until Guardian Ad Litem is Discharged and Authorizing Him to Deliver Refund Check to Miles Smith, adjudicated, fully and finally, Plaintiff's claims, which are now barred.[24] More specifically, the Chancellor held:

> I. That Miles Smith has fully complied with all of the obligations imposed upon him by the prior Orders of this Court, including, but not limited to, the following:
>
> ...
>
> (2) Reimbursed David E. Miles & Michael L. Miles the monies they advanced to pay the funeral expenses of Deborah Miles Gibson, deceased;
>
> (7) Paid the attorney's fees for the probate of this estate.
>
> II. That your executor has recovered firearms listed on Exhibit "1", Paragraph XII of the *Inventory, First and Final Accounting by David Earl Miles, Petition to Pay Attorney's Fees and Costs, and Petition for Distribution, to Close Estate and Vest Title* on file herein, and has delivered these firearms to Bobby Leon Gibson; that

[21] (R. p. 833-844).
[22] *Puckett Lumber Co. v. Bank of Tupelo*, 177 Miss. 152, 170 So. 2d 682, 683 (Miss. 1936); *Patterson v. State*, 594 So. 2d 606, 609 (Miss. 1992) (citing *Stewart v. City of Pascagoula*, 206 So. 2d 325 (Miss. 1968)).
[23] (R. p. 833).
[24] (R. p. 281-285).

> he distributed the sum of $352,978.08 to Bobby Leon Gibson; that he distributed $50,000.00 of the insurance proceeds of $403,978.08 received from Capital Life Insurance Policy No. 010626398 to fund the trust for Bobby Leon Gibson, III, as set forth in Paragraph VII of the Last Will and Testament of Deborah Miles Gibson to Bobby Leon Gibson and Cassinda Gibson as Co-Trustees of the educational trust established under the Last Will and Testament of Deborah Miles Gibson dated October 6, 2006….
>
> III. That all of the requirements imposed upon your Executor and/or Miles Smith by prior orders of the Court have been fully complied with…[25]

Clearly, the Judgment contemplated and ruled upon issues at the core of Plaintiff's Petition, which subsequently formed the basis of his Circuit Court Complaint.

Finally, Plaintiff contends that some part of the Estate remains open, precluding final Judgment therein; however, this issue is raised for the first time on appeal, and, more substantively, would actually undermine his standing, based on ripeness, to bring this professional negligence suit.[26] As the issue was not raised at the trial court level, it is forfeited.[27] Substantively, the argument is groundless. It is predicated upon Plaintiff's assumption that the Judgment did not address all pending matters. Plaintiff offers no evidence that the Judgment was not final, or failed to adjudicate those issues at the core of his complaints. In fact, to date, Plaintiff has never taken any step to set the Motion to Re-Open for hearing. If Plaintiff believed that motion had not been resolved (contrary to his admission in brief discussed above), then he could (and should) have requested a hearing on the issues raised.

Thus, *Harris v. Waters*,[28] dealing with the need for a Rule 54(b) certification where matters are left unresolved, is inapplicable. Additionally, the May 14, 2012 Judgment closed the Estate, ratified the actions and approved remaining actions of the Executor and approved

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[25] *Id.*

[26] Plaintiff's argument, without supporting authority, that the transfer from Circuit Court to Chancery Court waived an estoppel argument is likewise specious. Irrespective of the transfer or the forum court, Plaintiff's present suit inescapably addresses identical facts and arguments already decided in the underlying Estate proceeding, triggering the application of collateral estoppel, as discussed.

[27] *Patterson*, 594 So. 2d at 609 (citing *Stewart*, 206 So. 2d 325).

[28] 40 So. 3d 657, 658-59 (Miss. Ct. App. 2010).

payment of attorney's fees.[29] The argument, as a final point, further assumes that appeal of the Judgment was the only proper remedy available to Plaintiff, but Plaintiff also could have moved for reconsideration, or attempted to proceed with his Petition to Re-Open. Instead, he abandoned the Estate proceeding and filed a professional negligence action.

Estoppel doctrine serves the dual purpose of protecting litigants from the burden of relitigating an issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation. A disappointed litigant is bound by the facts decided in an earlier case and cannot relitigate those facts by repackaging or redirecting the claims. Plaintiff is estopped from bringing the same factual issues previously adjudicated in the Estate proceeding.

B. Judicial Estoppel

Plaintiff is judicially estopped from asserting he was misled into signing the October 2010 Petition to Convert, having later ratified his assent to the same relief. Thus, he is estopped from relitigating the factual issues and claims he made in the underlying Estate proceeding and from contradicting his prior representations regarding those same factual issues and claims.

The Mississippi Supreme Court adopted the principle of judicial estoppel to protect the integrity of the courts and to preclude self-serving paradoxes by parties.[30] In the case of *In re Coastal Plains, Inc.*,[31] the 5th Circuit stated that "Judicial estoppel is a 'common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position."[32] The purpose of this doctrine, the Court stated, "is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the

[29] (R. p. 281-285).
[30] *See Kirk v. Pope*, 973 So.2d 981 (Miss. 2007); *Pruitt v. Hancock Medical Center*, 942 So.2d 797 (Miss. 2006); *Daughtrey v. Daughtrey*, 474 So. 2d 598, 602 (Miss. 1985); *Banes v. Thompson*, 352 So. 2d 812 (Miss. 1977); *Wright v. Jackson Municipal Airport Au*thority, 300 So. 2d 805 (Miss. 1974); and *Sullivan v. McCallum*, 231 So. 2d 801(Miss. 1970)).
[31] 179 F.3d 197 (5th Cir. 1999).
[32] *Id.* at 205 (quoting *Brandon v. Interfirst Corp*., 858 F.2d 266, 268 (5th Cir. 1988)).

courts to suit the exigencies of self-interest.'"[33] Further, the Court stated that "[b]ecause the doctrine is intended to protect the judicial system, rather than the litigants, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary."[34]

Specifically, the doctrine of judicial estoppel has been applied to parties' positions in estate matters to preclude inconsistent assertions by a party before a chancery court.[35] In *In re Estate of Richardson*, an estate representative swore that there were eight wrongful death beneficiaries in order to proceed in a wrongful death action, and then, after settlement, moved to disqualify some of those beneficiaries (increasing the shares of the others in the settlement).[36] The court, applying the doctrine of judicial estoppel, disallowed the estate representative's inconsistent action.

Plaintiff's actions in the Estate Proceeding illustrate contrary positions, and resolution, on the merits, of the issues and allegations of misconduct he now raises:

1. On May 11, 2011, Plaintiff agreed to and signed an Inventory, First and Final Accounting by David Earl Miles Petition to Pay Attorney's Fees and Costs and Petition for Distribution, to Close Estate and Vest Title.[37] This Petition sets forth the arrangement by which Plaintiff would pay a portion of insurance proceeds devised to him under the Last Will and Testament of Deborah Miles Gibson to an educational trust for the benefit of his grandson.

2. On May 18, 2011, the Chancellor entered a Judgment Ratifying Inventory and First and Final Account by David Earl Miles; Authorizing Payment of Attorney's Fees and Costs and Distribution.[38] The Judgment recites account balances and distributions of which Plaintiff claims he was not provided knowledge, lists other assets of the Estate, sets forth the efforts taken by the Estate to regain ownership, from a third party, of the guns which Plaintiff claims were gifts by Deborah Miles Gibson, and specifically sets forth the agreement by which Plaintiff would pay $50,000 of insurance proceeds into an education trust in exchange for guns. Most saliently, the chancellor recited these

[33] *Id.*
[34] *Id.*
[35] *In re Estate of Richardson*, 903 So. 2d 51 (Miss. 2005) (utilizing judicial estoppel to keep a litigant from changing their position within the same proceeding under Mississippi law).
[36] *Id.* at 54.
[37] (R. p. 126-145).
[38] (R. p. 146-162).

devises after expressly noting that they were "with joinder and approval of Bobby Leon Gibson."

3. On July 12, 2012, the chancery court was petitioned to appoint Plaintiff as co-trustee of his grandson's educational trust in the Petition to Appoint Co-Trustees of Testamentary Trust.[39]

4. On July 28, 2011, the Chancellor entered an Order approving appointment of Plaintiff as a co-trustee, titled Order Acknowledging BancorpSouth's declination to serve as Trustee of the Bobby Leon Gibson, III Educational Trust Established under the Last Will and Testament of Deborah Miles Gibson, and Appointing Bobby Leon Gibson and Casinda Gibson as Co-Trustees of Said Trust.[40]

5. On May 10, 2012, Plaintiff, through his current attorneys, filed a Petition to Re-open Estate of Deborah Miles Gibson and Request Other Relief, with the Chancery Court of Forrest County in the matter of the Estate of Deborah Miles Gibson, in which Plaintiff raised the same facts and alleged the same misconduct that he later raised in his circuit court complaint.[41]

6. On May 14, 2012, the chancellor entered her Judgment Vesting Title, Closing Estate and Authorizing Executor to Retain Funds Remaining in Estate Account Until Guardian Ad Litem is Discharged and Authorizing Him to Deliver Refund Check to Miles Smith, originally signed on May 2, 2012. This final judgment resolved and ratified the entirety of the actions which formed the basis of Gibson's Petition to Re-open and which form the basis of the present Complaint filed in circuit court – retrieval by the Estate of guns which were improperly held by a third party; signature by Gibson of the Petition to Convert the Conservatorship to the Estate of Deborah Miles Gibson; actions taken pursuant to the Inventory, First and Final Account by David Earl Miles, Petition to Pay Attorney's Fees and Costs, and Petition for Distribution, to Close Estate and Vest Title filed on May 11, 2011; the setting aside of $50,000 from insurance proceeds to satisfy a bequest to Gibson's grandson's educational trust; and the delivery of the "firearms" to Gibson.[42]

Plaintiff is judicially estopped, after sponsoring positions on which the court relied over a number of years, from now asserting a contrary position to serve his own self-interest. Plaintiff raised, though his present counsel, issues and claims regarding his alleged harm in his Petition to Re-Open Estate, which mirror those in the suit at bar. The Chancellor presiding over the Estate

[39] (R. p. 172-175).
[40] (R. p. 176-179).
[41] (R. p. 220-280).
[42] (R. p. 281-285).

of Deborah Miles Gibson entered a Judgment finally adjudicating all issues before her in the administration of the Estate and ratifying the actions of the Executor David Miles and the Defendants. The Judgments entered by Chancellor Gambrell have preclusive effect as to the claims and issues alleged by Plaintiff. The issues and claims raised are finally adjudicated and are therefore barred by the doctrines of *res judicata* and collateral estoppel.

Plaintiff asserts that he was coaxed under duress into signing the Petition to Convert. But Plaintiff fails to note that he later assented to the same distribution by which he now claims to have been aggrieved.[43] More importantly, Chancellor Gambrell relied on Plaintiff's representations in rendering her Orders and Judgment in the underlying matter.[44] Chancellor Gambrell noted that her 2011 Judgment was entered "with joinder and approval of [Plaintiff] Bobby Leon Gibson."[45] Finally, Plaintiff not only signed and agreed to the 2010 and 2011 Petitions but received relief under them.[46] Indeed, Plaintiff derived a benefit through the Judgment, by receiving the guns and the insurance proceeds, and by being appointed trustee over his grandson's educational trust, and <u>he accepted each of these without objection</u>.

Judicial estoppel requires only that the party have taken a prior position inconsistent with their current one, and that the court relied on the prior position. Chancellor Gambrell, not once but twice (in her October 14, 2010 Order and her May 18, 2011 Judgment), relied on Plaintiff's assertion that he agreed to and joined in the distribution as set forth in the Petition. Plaintiff waited almost a full year before voicing an issue with the distribution which was expressly spelled out and to which he agreed, likewise indicating that he should be bound by laches.

[43] (R. p. 126-145, and 146-162).
[44] (R. p. 146-162 and 281-285).
[45] (R. p. 156, ¶ XV).
[46] (R. p. 146-162 and 281-285).

II. PLAINTIFF'S LEGAL MALPRACTICE ACTION IS AN IMPERMISSIBLE Collateral Attack ON THE JUDGMENT RENDERED BY THE CHANCERY COURT IN THE UNDERLYING ESTATE PROCEEDING

The appropriate remedy, if Plaintiff questioned the propriety of Chancellor Gambrell's judgment, was to challenge it via an appeal, as provided by the Rules of Civil Procedure and Appellate Procedure. Plaintiff's filing of his Petition to Re-Open is an express recognition that the Chancery Court presiding over the Estate was the proper forum in which to raise issues with the Chancery Court's rulings, and actions deemed "not proper."[47] Plaintiff, and his present attorneys, who were retained well before deadlines expired for challenging Chancellor Gambrell's judgment, opted not to appeal the judgment. Plaintiff filed a motion to re-open, but did not set it for hearing. Instead, Plaintiff has chosen to collaterally attack Chancellor Gambrell's judgment in this proceeding.

It is axiomatic that "a judgment of court of competent jurisdiction imports verity, and is presumed valid. In the absence of anything in the record appearing to the contrary, this Court will presume the trial court acted properly, and if evidence was necessary, that court heard sufficient evidence to support the judgment."[48]

"Collateral attack" is a tactic through which a party attempts to circumvent a prior ruling of one court by filing a subsequent action in a separate court.[49] The "attack" questions the integrity of a judgment.[50] "A collateral attack on a judgment is any proceeding to impeach a judgment which is not instituted for the express purpose of annulling, correcting, or modifying

[47] (R. p. 834).
[48] *Vinson v. Johnson*, 493 So. 2d 947, 949 (Miss. 1986); *Martin v. Miller*, 103 Miss. 754, 60 So. 2d 772 (Miss. 1913) (judgment conclusive in its character could not be attacked collaterally).
[49] *See McKinney v. Adams*, 95 Miss. 832, 50 So. 474 (Miss. 1909).
[50] *Id*. at 476.

such judgment or enjoining its execution."[51] A collateral attack may not be launched by any party whose affirmative conduct caused or resulted in the decree now sought to be set aside.[52]

In *Edwards v. Tobin*, the appeals court upheld a grant of summary judgment in favor of the defendants where the plaintiff's legal malpractice action effectively served to collaterally attack the underlying judgment.[53] "[Plaintiff's] malpractice action directly contravenes this prohibition against collateral attacks. An essential component of [plaintiff's] claim is his contention that the [trial court] wrongly decided his appeal…[plaintiff] now attempts to end run that decision, contending that the [trial court] would have reached a different legal conclusion if his lawyer had acted differently."[54] "This is no garden variety legal malpractice action….Informed decisions of the courts 'must be regarded as final, a concept which itself emanates from, and is required by, the societal need for certainty in the law.' This principle holds true whether the attack is couched as an action against a prior litigant, an action against a prior litigant's counsel or an action against one's own prior attorney."[55]

Plaintiff played an instrumental role in the entry of Chancellor Gambrell's Judgment. Plaintiff asserts that the agreement by which he would fund the educational trust in return for ownership of guns, that would otherwise be sold to satisfy the devise, was first raised in meetings in 2010. The record in the Estate of Deborah Miles Gibson reflects that Plaintiff signed off on the same agreement in 2011. Plaintiff again ratified the arrangement by petition to be approved as a co-trustee of the same educational trust. Plaintiff agreed to and signed Petitions which expressly contemplated his acceptance of the distributions made by the Estate pursuant to the Last Will and Testament of Deborah Miles Gibson. The record also indicates that Plaintiff raised

[51] *Id.* at 476.
[52] *Krohn v. Migues*, 274 So. 2d 654, 657 (Miss. 1973).
[53] 139 F. 3d 889, 1998 WL 123060, *4 (4th Cir. 1998).
[54] *Id*. at *4.
[55] *Id*. (citations omitted).

issues and claims regarding his alleged harm in his Petition to Re-Open Estate. Plaintiff had retained his present legal counsel prior to the conclusion of the Estate Proceeding and brought allegations mirroring those in the current suit.

On May 14, 2012, Chancellor Gambrell's Final Judgment was filed. It resolved and ratified the entirety of the actions which formed the basis of Plaintiff's Petition to Re-open and which form the basis of the present Complaint filed in Circuit Court.[56] Plaintiff failed to take any action to move for reconsideration or to appeal Chancellor Gambrell's Judgment, though he had ample opportunity to file motions or appeals in the underlying proceedings through his present counsel. Plaintiff did not exercise his opportunity to take curative action to mitigate or eliminate his claimed damages. Instead, he played an active (though through inaction in the Estate proceeding) role in creating his own legal malpractice action. There is no doubt that Plaintiff improperly seeks, though this action, to collaterally attack Chancellor Gambrell's Judgment. "Plaintiff believes actions by Chancellor Gambrell were not proper…."[57]

III. PROCEDURAL DEFICIENCIES LIKEWISE SUPPORT DISMISSAL AND/OR SUMMARY JUDGMENT AS TO APPELLANT PLAINTIFF'S CLAIMS.

Under Mississippi Code section 11-1-39, where an action is transferred from circuit to chancery court, or vice versa, the party bringing the action must re-file his complaint with the transferee court. The Mississippi Supreme Court has observed that a trial court is compelled to dismiss a transferred suit when a plaintiff fails to comply with Mississippi Code section 11-1-39, even when the parties have continued to litigate by engaging in discovery and other activity. Here, Plaintiff failed not only to comply with the statutory requirements upon transfer but also failed to fulfill the Chancery Court's requirements to properly bring this action before it.

[56] (R. p. 281-285).
[57] (R. p. 834).

Plaintiff's inaction resulted in additional undue delay, and in substantial prejudice to WWM's defense.

This indecision and/or inaction by Plaintiff, with regard to re-filing his Complaint, left the defendants without direction and caused undue delay, for over four months, in an action which Plaintiff waited not even 24 hours to initially file suit after an unfavorable Chancery Court adjudication of his arguments in the Estate action. Plaintiff improperly frames the procedural issue presented by Mississippi Code section 11-1-39. The re-filing of a Complaint before a transferee court, after a transfer, is to ensure proper notice to parties involved in the litigation of the claims post-transfer, and must take place within 30 days of transfer. It is also a procedural mechanism meant to prevent stagnation of claims and failure to prosecute by a plaintiff. Plaintiff does not deny his failure to re-file his Complaint within the 30-day period, but instead alleges the statute is inapplicable. This procedural deficiency further supports the lower court's dismissal of Plaintiff's claims.

Though the lower court did not rely on this procedural ground for its grant of the WWM Defendant's Motion to Dismiss, and, Alternatively, for Summary Judgment, it illustrates an additional procedural basis for dismissal, beyond the substantive reasons supporting the trial court's judgment.

IV. NO ATTORNEY-CLIENT RELATIONSHIP OR FIDUCIARY DUTY EXISTED WHICH MIGHT SUPPORT A LEGAL MALPRACTICE CLAIM BY APPELLANT PLAINTIFF AGAINST THE WWM DEFENDANTS.

Plaintiff's claims sound in professional negligence.[58] In order to survive summary judgment, Plaintiff must raise material disputed facts and proffer evidence of each element of each claim which he seeks to pursue. Plaintiff has not met this burden. Instead of offering competent summary judgment evidence, Plaintiff raised additional unsubstantiated allegations.

[58] (R. p. 445-457, ¶¶ 23-28 and 29-36).

Mississippi law provides that in order to maintain a claim of legal malpractice or negligence (breach of fiduciary duty) in the context of an attorney's actions, an attorney-client relationship is essential.[59] The absence of or failure to show such a relationship is fatal to Plaintiff's cause.[60]

In *Great American E & S Ins. Co. v. Quinairos, Prieto, Wood & Boyer, P.A.*, an excess liability insurer sued the primary insurer's attorney, alleging legal malpractice and negligence claims.[61] Great American alleged that the attorneys provided Great American information and strategies, including updates or reports on status.[62] Great American claimed this established an attorney-client relationship. The Court found that there was no basis for Great American's claim, where the attorneys interacted with Great American only by virtue of its relationship with an insured it shared with the primary insurer, the attorneys' actual client. The Court held the attorneys' advice to Great American was insufficient to give rise to an attorney-client relationship.[63] The holding further stated that the absence of this relationship proved fatal to the claims of legal malpractice and negligence, as no duty existed.[64]

The *facts* (as opposed to the *contentions*) alleged in the Complaint betray a fundamental shortcoming in the Plaintiff's suit. Insofar as the factual allegations pertain to WWM, there are no allegations supporting the existence of an attorney-client relationship under Mississippi law. WWM submits that Plaintiff cannot allege these facts because they do not exist. The only substantiation Plaintiff offers of an "attorney-client relationship" between WWM and himself is a scrivener's error on the Petition to Convert listing WWM as "Attorneys for Petitioners." Because Plaintiff was a one of the Petitioners, he claims he concluded WWM represented him.

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[59] *See Great American E & S Ins. Co. v. Quinairos, Prieto, Wood & Boyer, P.A.*, 100 So. 3d 420, 425 (Miss. 2012) (provision of information and strategies, including updates or reports on status, to parties with common interest does not form an attorney-client relationship).
[60] *Id.* at 425-26.
[61] *Id.* at 421.
[62] *Id*. at 425.
[63] *Id.*
[64] *Id.* at 426.

Of course, Plaintiff never sought clarification of this relationship from Joe Montgomery, and there are no other writings from which such an inference could be drawn, reasonably or not. WWM submit that Plaintiff's belief, even if true, was unreasonable under the circumstances. And it quickly became unfathomable. The *very next* pleading Plaintiff signed, the Petition for Distribution, clearly identified WWM as the "Attorney for the Estate." If Plaintiff was as attuned to and reliant on the signature lines of pleadings as he claims to have been, he surely would have noticed and questioned this discrepancy. Again, had Plaintiff taken action at that point, any claimed damages would have been averted.

The lack of truth to Plaintiff's claimed reliance on the signature blocks in the underlying Estate proceeding is further evidenced by his subsequent conduct. The signature block bearing the "*Attorneys* for Petitioners" designation bore two attorney names. Both Joe H. Montgomery and Christopher M. Howdeshell are listed. To be clear, Plaintiff makes no allegation that Howdeshell was his attorney. Indeed, Plaintiff's counsel, in a hearing before the lower court, indicated his agreement to dismiss all claims against Howdeshell. (Trans. p. 3, lines 8-16). This dismissal was effected on June 16, 2014.[65] If there was any veracity to Plaintiff's claim, his inference would have led him to the same belief regarding Howdeshell that he now claims against WWM.

WWM's meeting with beneficiaries as part of the representation of the Executor of the Estate, providing information regarding the status of the Estate, and drafting and/or coordinating the execution of documents to be presented to the chancery court in order to administer the matters of the Estate, do not give rise to an attorney-client relationship with an individual legatee. Instead, actions of that nature merely evidence the commonplace representation of an

[65] (R. p. 992). Gibson attempts to recast Howdeshell and Pittman, Howdeshell, Hinton & Hightower, PLLC as appellees, as listed in his Certificate of Interested Persons; however, these defendants were dismissed by Judgment of the trial court.

estate executor, in this case David Miles. Even if Plaintiff's reliance was reasonable and he manifested an intent that WWM act as his attorneys, which is expressly denied, there is no competent evidence to support or even raise a consent or acquiescence by WWM to take on the representation.

Plaintiff relies on *Edmonds v. Williamson*, for his assertion that "a written acknowledgment of representation by an attorney defendant satisfies the existence of an attorney-client relationship."[66] This is not what the court held in *Edmonds*. Instead, the Mississippi Supreme Court, in response to arguments that (a) a contract existed between the subject attorney and the purported client's wife and (b) an attorney-client relationship existed based on the attorney's actions, held that an attorney-client relationship existed *only* because the attorney-defendant had admitted in his Answer that he represented the plaintiff and expected compensation.[67] "Therefore, based solely on this admission by [attorney-defendant] Williamson, this Court finds that there was a lawyer-client relationship between [plaintiff] and [attorney]."[68]

Plaintiff offers no evidence of attorney-client relationship outside of claimed reliance on the signature block of a single pleading. He offers no evidence regarding recurring or scheduled meetings with Montgomery, no evidence of an agreement of representation, retainer or payment, maintenance of a client file by Montgomery, nothing to support the notion that counsel was received or that Plaintiff gave any indication he was seeking counsel from Montgomery. Indeed, the only interaction with WWM which Plaintiff placed before the court through briefing, was a group meeting at which WWM spoke to multiple individuals and engaged in no conduct specific as to Plaintiff. Plaintiff did not have a reasonable expectation that WWM were his counsel and never manifested the necessary intent that they so act.

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[66] 13 So. 3d 1283 (Miss. 2009).
[67] *Id.* at 1290.
[68] *Id.*

Importantly, Plaintiff had to "demonstrate to a lawyer his or her intent that the lawyer provide legal services."[69] Even if it were assumed, arguendo, that Plaintiff's group meeting and lack of specific contact or communication with WWM did somehow manifest his intent to receive their counsel, Plaintiff offers no evidence that WWM accepted the representation and acted on his behalf. Plaintiff argues that failure to manifest a lack of consent on the part of WWM existed. However, this argument fails because it requires that the "lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide services…"[70] Plaintiff offered no evidence and raised no disputed fact regarding WWM's knowledge of his reliance. The knowledge did not exist because Plaintiff's actions never gave indication of reliance or intent to receive counsel from WWM.

Plaintiff also fails to establish the existence of a fiduciary duty between WWM and himself.[71] He relies on a single, completely distinguishable case to allege that an "overmastering influence" and "weakness, dependence, or trust, justifiably reposed" existed between WWM and Plaintiff. *Estate of Haney,*[72] provides no treatment of attorney duties, limiting its analysis to the breach of a fiduciary duty by an individual who induces execution of a will to his benefit. The case is *limited in context* to instances of undue influence in the **execution** of a will, not administration of an estate – "[b]efore the presumption arises, there must be an abuse of the confidential relationship, **and that abuse must relate to the execution of the will**."[73]

Additionally, Plaintiff offers absolutely no evidence, and certainly no competent summary judgment evidence, to support the allegation that he possessed attributes which might

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[69] *Singleton v. Stegall*, 580 So. 2d 1242, 1244 n. 2 (Miss. 1991).
[70] *Id.* (citing payment of the attorney's fee and acceptance of same as the basis for the existence of an attorney-client relationship).
[71] Moreover, "[i]f a complaint is intended to allege a breach of fiduciary duty, it would be necessary to state with particularity the facts which purportedly created the duty that was breached..." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1216 (Miss.1996). A conclusory allegation is insufficient. *Id*.
[72] 516 So. 2d 1359 (Miss. 1987).
[73] *Estate of Haney*, 516 So. 2d at 1361 (citing *Costello v. Hall*, 506 So. 2d 293 (Miss. 1987)).

make him more susceptible to influence – that he was feeble, of unsound mind or subject to other mental disability, unable to comprehend or read the documents agreed to or to seek counsel, or that he was justifiably dependent. There is no evidence that any undue influence was ever attempted, much less, exercised by WWM over Plaintiff. Instead, Plaintiff makes, via briefing, only the general, unsupported and self-serving allegation that trust on the part of Plaintiff and overmastering influence on the part of WWM existed. No affidavit or testimony by Plaintiff was offered in support of this assertion; no competent medical evidence to prove infirmity or cognitive deficit; and no competent evidence to prove interactions between Plaintiff and WWM took place which could give rise to a justifiable reliance on and trust placed in WWM. Certainly, nothing was offered to show private meetings, counsel or that a relationship existed.

Consequently, Plaintiff's claims for breach of duty and negligence fail because no attorney-client or fiduciary relationship existed and, therefore, no duty ran from WWM to Plaintiff.

V. APPELLANT PLAINTIFF'S CLAIMS ARE LIKEWISE SUBJECT TO SUMMARY JUDGMENT FOR ABSENCE OF CAUSATION BECAUSE PLAINTIFF SOLELY CAUSED HIS OWN ALLEGED DAMAGES.

In order to maintain a legal malpractice claim, whether based on breach of the standard of care or the standard of conduct, or a breach of fiduciary duty claim, a plaintiff must prove the alleged actions of the attorney or firm proximately caused the plaintiff's harm.[74] "[I]n order to maintain a legal malpractice claim, it must be determined whether the attorney's alleged negligence affected the outcome of the chancery court proceedings…."[75] In *Rogers*, the court held "[i]n order to establish legal malpractice, proximate cause, and the extent of the alleged

[74] *Crist v. Loyocano*, 65 So. 3d 837, 842 (Miss. 2011).
[75] *See Rogers v. Eaves*, 812 So. 2d 208 (Miss. 2002) (holding that for matters subject to chancery court jurisdiction, the chancery court "is in the best position to efficiently examine the facts and circumstances" particularly where the court has "heard extensive litigation of these issues and examined both the numerous witnesses and documents during the course of a case."); *see also Trustmark Nat. Bank v. Johnson*, 865 So. 2d 1148, 1150-51 (Miss. 2004).

injury must be proved by the plaintiff."[76] "The plaintiff bears the burden to show that 'but for their attorney's negligence, [plaintiff] would have been successful in the prosecution or defense of the underlying action."[77]

Plaintiff inaccurately asserts that the trial court ended its analysis at holding that no attorney-client relationship existed. This is not the case. The trial court also held that Plaintiff wholly failed to demonstrate causation:

> Plaintiff failed to make a showing sufficient to establish the existence of one (here more than one) of the three elements of malpractice – (1) an attorney client relationship – plaintiff fails here; (2) the attorney's negligence; and (3) proximate cause of injury – here the Plaintiff fails again, completely. How can Plaintiff be allowed to come into this Court of equity complaining about his outcome in the estate matter when he first consented to the relief he obtained, and second, when he had a perfect remedy or route to have his claim or concern addressed but he intentionally and pointedly abandoned that right and opportunity to pursue a negligence claim in the Circuit Court. Respectfully, this is astounding to the Court. It is tantamount to and has the practical effect of abandoning his proper remedy in Chancery Court to address his complaint in order to shore up his negligence claim in Circuit Court. Such cannot be.[78]

Under Mississippi Code section 9-5-83, a chancellor has authority to commence inquiry into allegations of improper action by a guardian, conservator or the estate, by its executor or attorney.[79] The record in the Estate proceeding reflects that Chancellor Gambrell did not find merit to the allegations set forth in Plaintiff's Petition to Re-Open. It is undisputed that Plaintiff, along with all other legatees, signed and agreed to the Petition to Convert in October of 2010.[80] It is undisputed that Plaintiff signed and agreed to the May 11, 2011 Petition for Distribution, wherein $50,000 was paid into an education trust for Plaintiff's grandson out of life insurance

[76] 812 So. 2d at 211-12; *Wilbourn*, 687 So. 2d at 1215.
[77] *Rogers,* 812 So. 2d at 211-12.
[78] (R. p. 1005).
[79] *Newsom v. Federal Land Bank of New Orleans*, 184 Miss. 318, 185 So. 2d 595, 600-601 (Miss. 1939) (citing Miss. Code Ann. § 9-5-83); *see also Walker v. Cox,* 531 So. 2d 801, 803 (Miss. 1988) (citing *Yates v. Box*, 198 Miss. 602, 612, 22 So. 2d 411, 415 (Miss. 1945)).
[80] (R. p. 35-46).

proceeds.[81] It also is undisputed that Plaintiff accepted possession of several shotguns, which the Estate went to great expense in retrieving from a third party.

As to other alleged damages, Plaintiff fails to offer any evidence of his interest in would-be distributions. Primarily, Plaintiff argued for the first time in Response to WWM's Motion to Dismiss that he was damaged through loss of a share in decedent, Deborah Miles Gibson's, interest in Miles Lumber Company. This claim was never substantiated by competent evidence or otherwise proven to be recoverable by Plaintiff. Indeed, no basis was provided for the alleged value, percentage of the interest or to support that the interest was not subject to restriction on transfer (i.e., right of first refusal or other limitation). Having dismissed his claims against both the Conservator and counsel for the Conservator, Plaintiff also has abandoned his claims that the decedent's Estate was improperly depleted. This undermines any argument that sale of certain Estate assets was not necessary to effect specific bequests under the Last Will and Testament.

Indeed, it is uncontroverted that Plaintiff did not raise any issue as to the underlying proceedings, including the distribution of assets, or to the conduct of the parties or their attorneys, until almost one year later, when he filed his Petition to Re-open in May 2012. Even then, Plaintiff failed to take any action on his Petition to Re-open after it was filed. Though Plaintiff actually had summonses issued, he deigned neither to serve the Petition on the parties nor to set it for hearing. Presumably, Plaintiff either acquiesced or realized his Petition was unsupported by law, but in either event he suffered his alleged damages at his own hand. No post-judgment relief was sought and no appeal was noticed. Plaintiff consciously chose not to pursue his relief in the Estate proceeding, abandoning it to pursue legal malpractice and negligence claims against WWM. This decision alone resulted in his claimed damages, breaking

[81] (R. p. 126-145).

the chain of causation between any negligent acts of WWM (which are denied) and the Estate proceeding outcome.

CONCLUSION

Plaintiff has dressed-up his prior estate claim and now masquerades it as a separate legal malpractice lawsuit. The Summary Judgment of the lower court should be affirmed in all respects, as Plaintiff's claim cannot clear the "hurdles" of res judicata, collateral estoppel, failure to exhaust remedies in Chancery, improper ancillary attack on the Chancellor's Judgment and multiple procedure hurdles.

This the 15th day of July, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document was served via U.S. Mail, postage prepaid to the following counsel of record:

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This the 15th day of July, 2015.

s/James G. Wyly, III
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